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May 30, 1997

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

Re: MM Docket No. 93-25
Direct Broadcast Satellite
Public Service Obligations

Dear Mr. Caton:

Transmitted herewith, on behalf of United States Satellite Broadcasting Company, Inc., is an original and four copies of its Reply Comments in the above referenced Docket.

Should there be any questions, please communicate with the undersigned.

Sincerely.

David A. Vaughan

Enclosures

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of Section 25	)	
of the Cable Television Consumer	)	MM Docket No. 93-25
Protection and Competition	)	
Act of 1992	)	
	)	
Direct Broadcast Satellite	)	
Public Service Obligations	)	

REPLY COMMENTS
OF
UNITED STATES SATELLITE BROADCASTING COMPANY, INC.

Dated:
May 30, 1997

Marvin Rosenberg
David Vaughan

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Counsel for United States Satellite
Broadcasting Company, Inc.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
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REPLY COMMENTS
OF
UNITED STATES SATELLITE BROADCASTING COMPANY, INC.

United States Satellite Broadcasting Company, Inc. ("USSB") submits its reply comments in connection with the Commission's January 31, 1997 notice requesting further comments in this matter. The notice inter alia sought comments on how to apply the requirements of sections 312(a)(7) and 315 of the Communications Act to DBS providers and whether "public interest or other requirements" should be imposed on DBS providers other than the minimum requirements of section 25(a) of the 1992 Cable Act. Comments were solicited as to whether the additional public interest service requirements should be required in light of the rapid deployment of DBS service and technological advances.

Comments were also requested on how to apply the requirements of section 25(b) of the 1992 Cable Act, particularly the percentage reservation of channel capacity for noncommercial programming. In this connection, the Commission asked whether certain terms should be defined and what entities other than "national educational programming suppliers" must be afforded access to channel capacity

under section 25(b). Comments were due April 30, 1997 with reply comments due May 30, 1997.

In its comments, USSB pointed out that DBS is still a nascent industry subject to significant technological and economic risks. In these circumstances, DBS providers need maximum flexibility in meeting their public service responsibilities. For this reason, USSB believes that only the minimum requirements of section 25 should be imposed upon DBS providers and initial compliance should not be required earlier than two years following adoption of the final rule.

DBS PROVIDERS NEED MAXIMUM FLEXIBILITY IN MEETING PUBLIC SERVICE OBLIGATIONS

The comments of DBS providers, particularly those presently providing DBS services, agree that DBS is still a nascent industry with a great deal of promise. Its audience is still relatively small compared to cable service. Thus, it is widely reported that DBS has five million subscribers to cable's sixty-five million. Until DBS matures further and has an opportunity to fully develop its capabilities, it should not be rigidly restricted.

USSB continues to support a flexible approach to DBS public service obligations. Such an approach includes an obligation set at 4% of channels offered to the public. DBS providers with less than 50 channels would have an obligation of two channels with the second channel not being required until the provider has 44 operational channels. No channels should be required to be

exclusively dedicated to public service programming and the obligation should be phased in over two years.

THIS RULEMAKING IS NOT AN APPROPRIATE FORUM TO RESOLVE SO-CALLED "REGULATORY PARITY" ISSUES OR TO IMPOSE FEES/TAXES UPON THE DBS INDUSTRY

The Commission should consider the comments of cable interests with skepticism. These comments appear to be less concerned with assisting the Commission in interpreting and implementing section 25 than with attempting to hamstring a potentially significant competitor in its incipiency. See comments of Small Cable Business Association; Time Warner Cable; US West Inc.; and the National Cable Television Association, Inc.

Section 25 was not enacted as a vehicle to create a regulatory scheme to restrain competition between cable and DBS. The demands of various cable commenters that the Commission impose charges equivalent to franchise fees and local property taxes upon DBS providers has not been mandated by Congress and is therefore outside the scope of this rulemaking. See comments of the Small Cable Business Association; Time-Warner Cable.

Other cable comments also appear to have the objective of burdening and limiting DBS competition rather than helping construct a realistic, meaningful DBS public service obligation that appreciates DBS's uniqueness. Thus, US West's suggestion that DBS providers reserve seven percent of available channels without regard to the size of particular DBS providers would simply impose

the maximum permitted limitations on DBS service without regard to policy or DBS capability.

The comments of the Denver Area Educational Telecommunications Consortium, Inc., et al. ("DAETC") are an equally overreaching attempt to use this rulemaking as a vehicle to advance an agenda not contemplated by Section 25. DAETC makes several proposals that would require DBS providers to pay up to 5% of their gross revenues to fund a "Programming Consortium" and a 501(c)(3) corporation to assist needy programmers. While cloaked as donations in return for benefits to DBS providers, these proposals are not authorized by Section 25 and should not be pursued without additional Congressional input and rulemaking.

THE STATUTORY REACH OF SECTION 25 IS LIMITED AND SHOULD NOT BE RIGIDLY APPLIED

In addition to the proposals to use Section 25 as a vehicle to tax DBS providers or to have DBS providers fund certain types of programmers, many commenters advocate interpretations of section 25 that would unnecessarily limit the flexibility of DBS providers and the opportunity to explore and develop diverse possibilities for DBS public service.

Several commenters would limit the definition of "national educational programming supplier" to the examples of noncommercial entities mentioned in section 25(b)(5). See Comments of Association of America's Public Television Stations and the Public Broadcasting Service, pp. 13-15; DAETC. In fact, the language of Section 25(b)(5) merely states that such entities are "included"

within the definition not that the definition is limited to such examples. There is simply no reason to limit this definition. The Commission should rely upon the good faith judgement of DBS providers to identify such programming. This will encourage diversity and will not result in an "established" list which leaves out otherwise qualified suppliers.

Various commenters would set the percentage level of the "portion of [] channel capacity" for noncommercial educational and informational purposes at the maximum of seven percent. One, DEATC, would apparently interpret paragraphs (a) and (b) in such a fashion as to require up to ten percent of channel capacity be used for public service by some DBS providers. See comments of DEATC. This proposed reading of Section 25 is unique to DEATC and is another example of overreaching in this rulemaking. The DEATC reading is not only unnecessary, it would unduly complicate the otherwise relatively straight-forward provisions of Section 25.

DEATC would also interpret editorial control with respect to Section 25 such that DBS providers not only would have no involvement in program content but also could not select public service programs. There is no basis, however, for distinguishing the broad editorial discretion of broadcasters under the First Amendment and that of DBS providers. Like broadcasters, DBS operators should remain free to select programmers, the timing, and placement of such programming as long as they do not exert editorial control over the content of such programming.

In fact, there is no evidence to support DAETC's claim that Congress intended for Section 25(b)(3)'s language concerning editorial control of "video programming provided pursuant to this subsection" to be interpreted the same as similar language in 47 USC 532(c)(2). See Reply Comments of DAETC, et al. Section 532(c)(2) is concerned with cable access programming and is unique to cable as its more restrictive language (which DAETC does not quote) reveals. Thus, Section 532(c)(2)'s language "shall not exercise any editorial control over any video programming" is immediately qualified by the following language:

> "or in any other way consider the content of such programming, except that a cable operator may refuse to transmit any leased access program or portion of a leased access program which contains obscenity, indeceny, or nudity and may consider such content to the minimum extent necessary to establish a reasonable price for the commercial use of designated channel capacity by un unaffiliated person."

47 USC 532(c)(2). No similar limiting language is contained in Section 25(b)(3) for DBS programming nor is there any legislative history indicating that Congress intended that Section 25(b)(3) be interpreted as restrictively as Congress explicitly stated when enacting Section 532(c)(2). Thus, Section 25(b) literally only prohibits the exercise of editorial control with respect to programming "provided pursuant to this section." It does not prohibit DBS providers from selecting public service programming, otherwise the additional language of "or in any other way consider the content of such programming" would have been included as it was with Section 532(c). Moreover, as with Section 532(c), provision

would have been made to protect DBS providers from being forced to transmit obscene or indecent programming. Plainly, Congress did not equate Section 25(b) with Section 532(c).[1]

With respect to defining "direct costs" under Section 25(b), USSB and other DBS providers have urged that this term be broadly defined. Other commenters have generally dissented on the basis of the items that should be considered direct costs. DEATC, on the other hand, has gone even further and suggested that rates be set below 50% of direct costs such that the cost of access be set at or near zero. This suggestion is particularly insensitive to the formative and risky stage of DBS service and should not be given serious consideration.

Many commenters urge that certain types of public service programming be preferred over others. See e.g., comments of Center for Media Education (children's programming); Children's Television Workshop (children's programming); Research TV. While USSB appreciates that these commenters want specific recognition of certain types of programming, USSB generally does not think that the statutory definitions should be further refined by identifying

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[1] Indeed, as DAETC argues in another context, Congress' regulation of the cable industry were intended to "curb cable's own monopolistic abuses...and [were] direct responses to the vast record of specific anticompetitive abuses by the cable industry." Reply Comments of DAETC, et al., p. 29. DAETC continues "[m]ost importantly, Congress chose, in the 1992 Act, to regulate DBS through Section 25, and not through the other provisions the cable industry now wishes to apply to DBS." Id. While claiming that Section 25(b) was "modeled" on cable regulation "specifically the PEG/leased access scheme," DAETC nowhere explains the substantial difference in the language of Section 25(b)(3) and Section 532(c)(2).

specific categories of programming as being acceptable. That would by implication eliminate or discourage equally meritorious programming. Most importantly, given the nascent stage of DBS service, USSB opposes having specified percentages set aside for particular categories of public service programming until experience defines those categories that are uniquely adaptable to DBS.

With respect to political programming, however, USSB continues to believe that the national footprint of DBS makes it unsuitable for local or regional access. It continues to appear, given the technological configuration of existing DBS systems, that only national federal campaigns for the offices of President and Vice President can make efficient use of DBS service. DBS should have the same flexibility as broadcast to determine "reasonable access" and "equal opportunity." No comments established that DBS should also be considered less trustworthy than broadcast in this respect. As with cable, USSB also believes that DBS providers should have the discretion as to the channel to make available for equal opportunity.

Finally, USSB continues to believe that the public service obligations be phased in over two years. Suggestions that the obligation be made immediate (or within 45 days) appear almost punitive and ignore the voluntary efforts of DBS providers such as USSB to provide public service programming since inception of this service.

CONCLUSION

USSB urges the Commission to initiate DBS public service obligations by permitting DBS providers maximum flexibility in meeting that obligation. This will provide an opportunity for a still formative industry to explore its full capabilities and to develop services that DBS can uniquely provide. Until DBS demonstrates that it is not trustworthy, there is no need to apply the "regulatory hand" rigidly or to prematurely define the limits of public service.

Respectfully submitted,

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